absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. *State of Georgia* v. *Atlantic and Gulf R. R. Co.*, 60 Georgia, 268.

We are, therefore, of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia legislature, in so far as it provides for an *ad valorem* tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract.

But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular.

If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad. The Georgia act taxing franchises treats the franchise as property and requires that "they shall be returned and valued in the same way as returns are made by railroads of their physical property. . . ." And that "all franchises of value shall be returned for taxation and taxed as other property." That a law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract

is well settled. *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Gulf & Ship Island Railroad* v. *Hewes*, 183 U. S. 67, 77.

Included in the total mileage owned and operated by the appellee railroad company is a line eighteen miles long, known as the Washington Branch. The company has all along claimed that this branch road was within the partial exemption clause of its original charter, granted in 1833. So far as appears from this transcript, this claim has not before been challenged, though no distinct issue seems ever to have been made in respect to its exclusion by reason of the legislation under which that branch was acquired. Neither does the answer of the comptroller in this case claim or set out any difference between the tax exemption applicable to the other parts of the appellee's railroad and this Washington branch, and the decree of the court below expressly finds that the original charter exemption includes this Washington branch. But the general denial that any part of the property of the railroad company was exempt from *ad valorem* taxation may well be regarded as covering the parts which make up the whole. To the decree holding the Washington branch exempt the comptroller has moreover assigned error, based upon the legislation under which that branch was constructed. The right of exemption claimed for this branch was, however, distinctly put in issue by the counties of Wilkes and Talliaferro, which, for this purpose, were allowed to intervene, having a direct interest due to the fact that that branch, passing through those counties, would be subject to county taxation if not within the tax exemption clause. These counties have appealed from the decree below and assigned error also.

The first legislative enactment in regard to the construction of the Washington branch road seems to have been in the act of 1833; but nothing was ever done under that. The same may be said in reference to another act passed in 1836. In December, 1847, an act was passed in these words:

"The power heretofore granted to the Georgia Railroad

and Banking Co. to construct a branch of their road to Washington, in the county of Wilkes, be, and the same is, hereby revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company ($200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the legislature may hereafter impose."

But this was a section in an act amending the charter, and was never accepted. See 26 Georgia, 651, 654. At the same legislative session, on February 5, 1850, another act was passed in these words:

"That [naming incorporators] be and they are hereby authorized to build, construct and keep a plank or railroad from the town of Washington, in Wilkes county, to some point on the Georgia Railroad and Banking Company's railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding $200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

So far as we can discover, the only legislative authority for the construction or acquirement of a branch railroad to Washington, accepted or acted under by it, is found in the act of January 21, 1852, entitled "An act to authorize the consolidation of the stocks of the Georgia Railroad and Banking Company and of the Washington Railroad or Plank Road Company, incorporated, February the fifth, eighteen hundred and fifty, and for other purposes." The first section of that act provides:

"That the Georgia Railroad and Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad and Banking Company issuing stocks in their said

company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company, and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad and Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions imposed on the same."

That this consolidation neither extinguished the Georgia Railroad and Banking Company, nor deprived it of any of its powers, privileges or immunities, is plain. No such result has been claimed. Nor is it claimed that it thereby lost any tax exemption which it then had. The act authorizing the consolidation is substantially like that under which the Central Railroad and Banking Company was consolidated with the Macon Railroad, considered in *Central Railroad Company* v. *State of Georgia*, 92 U. S. 665, where it was held that the tax exemption which the Central Railroad had enjoyed, continued after consolidation in respect of the property of that company, but that as the Macon company, consolidated with it, had no exemption, its property continued subject to taxation. That the Washington Railroad or Plank Road Company would go out of existence when this merger was accomplished is plain; it was, indeed, absorbed by the Georgia company. The purpose was to vest in the latter all of the rights, powers and privileges of the merged company without diminishing or enlarging them. See what is said by Chief Justice Fuller in commenting upon a similar merger in *W. & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 300.

Did the Washington Railroad before consolidation possess any contract tax exemption?

The claim that it did is based upon the provision in the

act under which it was incorporated, providing that it should "be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833 to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

The question, then, is, whether, under the power "to *exercise* all the *powers* and *privileges* [italics ours] conferred by the act incorporating the Georgia Railroad Company, the immunity from any other tax than one based upon a given per cent of annual net profits was granted to that company." The affirmative of this proposition finds some support in the cases of *Humphrey* v. *Pegues*, 16 Wall. 244; *Chesapeake & O. R. Co.* v. *Virginia*, 94 U. S. 718; *South Western R. Co.* v. *Georgia*, 92 U. S. 665, and *Tennessee* v. *Whitworth*, 117 U. S. 139. In later cases this doctrine of a legislative transfer of a tax immunity under the term franchise, powers, estates or privileges was questioned. Thus, in *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176, a tax immunity was held not to pass under a mortgage foreclosure sale under the provision of a statute which authorized the purchaser to become a corporation and "succeed to all such franchises, rights and privileges" pertaining to the mortgagor company. In *Picard* v. *East Tennessee &c. R. Co.*, 130 U. S. 637, 642, it was held that such an immunity would not pass to a purchasing company under a decree enforcing a statutory lien, where the sale, as confirmed, was of the "property and franchises" of the mortgagor company. In that case it was said:

"It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 297; *K. & W. R. Co.* v. *Missouri*, 152 U. S. 301, and *Phœnix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174, the earlier cases were also much shaken so far as they tended to establish that a tax exemption would be transferred by legislative enactment conferring upon one road the powers or franchises or privileges of another, in the absence of other language or pregnant circumstances, showing a plain intent to confer such exemption.

But whatever doubt upon this subject may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. R. Co.* v. *Rochester*, 205 U. S. 236, 252. Mr. Justice Moody, after reviewing all of the cases referred to above and others, sums the matter up by saying:

"We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity."

There is an absence of anything in the history of this branch railroad which points to a purpose to grant any exemption from taxation. Thus, in the act of December 20, 1849, reviving the authority of the Georgia Railroad and Banking Company to construct such a branch, originally authorized by earlier acts, it was expressly provided that the stock to be issued for the purpose "should not be exempt from taxation, as is secured to the present stock by the later clause of the 15th section of the charter of said company," etc. This provision was probably the very reason why the Georgia Railroad and Banking Company did not accept or act under that statute. At the same session of the legislature an independent company was created to construct and operate the same branch road. Presumably with the knowledge of the fact that the Georgia Railroad and Banking Company could

not itself construct this road with immunity from taxation, this act authorizing this new corporation to build the same branch, declared that this company should be "authorized to *exercise* [italics ours] all powers and privileges" conferred by the act originally creating the Georgia Railroad and Banking Company. It is one thing to have authority to "exercise" all the "powers and privileges" of another company, and another thing to enjoy an exemption from taxation. The "*exercise*" of the "powers and privileges" of the company referred to was reasonably essential to the construction and operation of the independent railroad. Its immunity from taxation was not. See *Wilmington & Weldon R. R.* v. *Alsbrook*, 146 U. S. 279, 295, and *National Bank* v. *United States*, 101 U. S. 1. The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

We conclude, therefore, that the Washington Railroad or Plank Road Company had no exemption from taxation at the time this consolidation occurred. That the consolidating act did not intend to confer any immunity from taxation which did not then exist is plain. The object was to vest in the Georgia company the property and franchises and rights and privileges of the Washington company. When the Georgia company succeeded to its property and franchises, it did so subject to whatever right the State had in the matter of taxation. The case in this aspect is controlled by *Central Railroad Co.* v. *Georgia*, 92 U. S. 665.

The decree of the court below is modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects it is affirmed. The costs of this appeal will be divided between Wright, Comptroller General, and the Georgia Railroad and Banking Company.

Affirmed.